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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 143

JAMAICA WATER SUPPLY COMPANY,
Petitioner,

against

THE CITY OF NEW YORK,
Respondent.

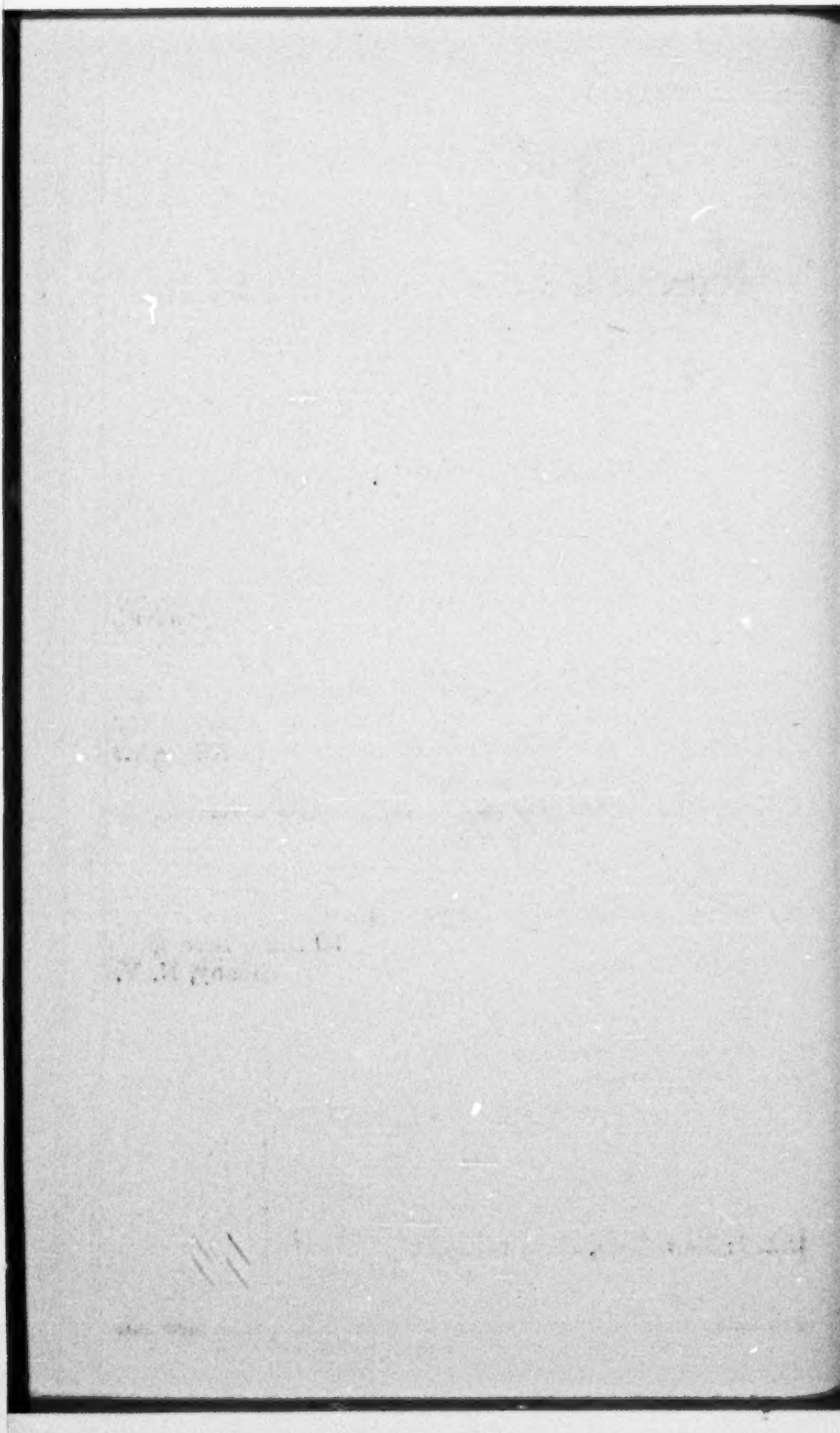
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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Dated: New York, June 24, 1953.

APPEAL PRINTING CO. INC., 130 CEDAR ST., NEW YORK, WORTH 4-3033



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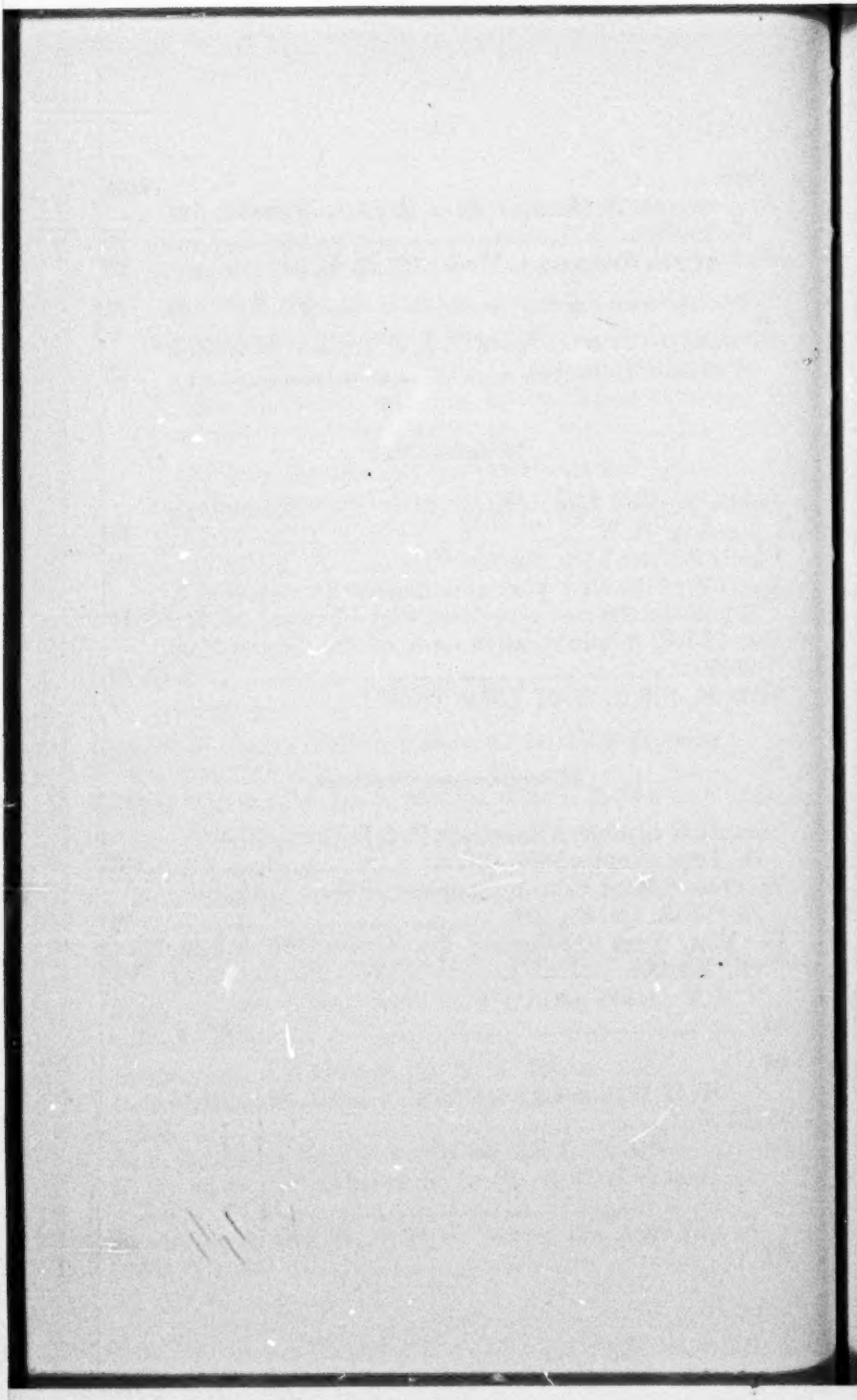
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable FRED M. VINSON, *Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Jamaica Water Supply Company, respectfully shows:

I. Summary statement of matter involved.

This action was instituted in the Supreme Court of the State of New York by petitioner, Jamaica Water Supply Company, against respondent, The City of New York, to recover damages sustained as the result of being required by the City to remove and replace, without compensation,

water mains originally installed under public streets in obedience to summary orders duly issued by or on behalf of said respondent.

1. ***The complaint.***

The complaint herein, verified April 24, 1951, sets forth three causes of action.

The first cause of action alleges that petitioner is a water-works corporation engaged in the distribution and sale of water for domestic, commercial and municipal use in the Borough of Queens, City of New York (R. 3, 4); that respondent, a municipal corporation, likewise distributes and sells water for similar use in the same general area (R. 4); that petitioner, in obedience to respondent's orders, had extended its water system by installing water mains of a particular kind and size at locations specifically designated in and by said orders (R. 4); and that these locations, so designated, were under City streets (R. 4, 12). It is further alleged that respondent subsequently entered into a contract with a third party for the installation of pipe connected with its municipal water system and ordered this work to proceed as planned even though that would necessitate the removal and relocation of petitioner's said water mains (R. 4, 5, 10, 11).

In the dispute that then arose respondent claimed that petitioner was legally obligated to remove and relocate said water mains at company expense despite the fact that these mains originally had been installed under public streets in obedience to respondent's summary command. On the other hand, petitioner contended that investments made pursuant to valid administrative orders, which were adopted under a statute authorizing the issuance of the same without hearing or factual findings, gave rise to property rights protected by constitutional guarantees

(R. 5, 12). However, to avoid delaying work on said proposed city water pipe construction pending judicial settlement of this dispute, the parties entered into a stipulation wherein and whereby it was agreed that petitioner would assume the cost of removing and replacing its said water mains in the first instance without prejudice to any of its rights in the premises (R. 12, 13).

Thereafter respondent refused to compensate petitioner for the damages sustained as a result of its obedience to all of the conflicting orders or directives issued by the City (R. 4), and petitioner, alleging a violation of its constitutional rights and privileges (R. 5), brought this action to recover the same.

The second and third causes of action pleaded in the complaint herein are identical in substance with the one first set forth, the only real distinction being that each cause of action relates to a different water pipe line. The amount in controversy in all three causes of action totals $21,356.41, plus interest and court costs.

2. *Proceedings in the State Courts.*

By notice of motion dated February 11, 1951, respondent moved at a Special Term of the Supreme Court, Queens County, to dismiss petitioner's complaint on the ground that it failed to state facts sufficient to constitute a cause of action (R. 3). This motion was denied (R. 2), with an opinion by Daly, J. (R. 20).

On appeal, the Appellate Division, Second Department, reversed the Special Term's order with a memorandum opinion (R. 26; 280 App. Div. 834); that court granted respondent's motion to dismiss; and thereafter judgment dismissing the complaint in this action, with costs, was duly entered in the Office of the Clerk, County of Queens, on July 14, 1952 (R. 24, 25).

Petitioner duly appealed from said judgment of reversal and dismissal to the Court of Appeals (R. 23), which Court on January 16, 1953, affirmed the same with costs and without opinion (R. 27). Judgment of affirmance in accordance with said order of the Court of Appeals was granted on February 11, 1953 (R. 29).

By notice dated February 10, 1953, petitioner duly moved for leave to reargue said appeal in the Court of Appeals, or, in the alternative, for amendment of the complaint and remittitur in certain particulars. Said Court, by order dated March 5, 1953, denied said motion for reargument or for amendment of the complaint and granted petitioner's motion to amend the Court's remittitur as requested (R. 31). Said remittitur was duly amended by adding thereto a recital stating in effect that this appeal had presented to the Court of Appeals questions under the Constitution of the United States which were necessarily passed upon by said Court when deciding the issues herein.

II. Jurisdictional Statement.

1. The statutory provision believed to sustain the jurisdiction of this Court is 28 U.S.C., §1257 (New Title), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

2. The judgment sought to be reviewed by certiorari was granted February 11, 1953 (R. 29). Said judgment became final on entry of the order of the Court of Appeals of the State of New York dated March 5, 1953, denying petitioner's application for rehearing and amending the remittitur herein in the manner and respects as set forth therein (R. 31). By order of Mr. Justice Jackson dated May 26, 1953, the time for filing petition for writ of certiorari in this cause was extended to and including July 3, 1953 (R. 33), and the date of this application for certiorari is June 24, 1953.

3. The said Court of Appeals of the State of New York is the highest court of the State of New York in which a decision in this case could be had and this action specifically set up a title, right, privilege or immunity claimed by petitioner under the Constitution of the United States.

4. The court of first instance was the Supreme Court of the State of New York and the stage in the proceedings in said court of first instance at which, and the manner in which, the federal question sought to be reviewed was raised, is as follows:

In its complaint and on argument before a Special Term of the Supreme Court of the State of New York against respondent's motion to dismiss said complaint, petitioner pleaded that the effect of the City's actions in the premises was to confiscate and appropriate plaintiff's property without due process of law in violation of Article XIV, §1, of the articles in addition to, and amendment of, the Constitution of the United States of America (R. 5, 8, 10).

5. The stage in the proceedings in the Appellate Division of the Supreme Court of the State of New York, Second Department, and in the Court of Appeals of the State of New York at which, and the manner in which,

the federal question sought to be reviewed was raised, is as follows:

By briefs and arguments presented to said Courts for and on behalf of Jamaica Water Supply Company. Point I of petitioner's brief filed in the Court of Appeals read as follows:

> "Plaintiff has a constitutional right under both State and Federal Constitutions to maintain this action."

6. The method of raising the federal question sought to be reviewed is by the allegations of the complaint served in this action (R. 5, 8, 10).

7. The manner in which the federal question sought to be reviewed was passed upon by the Court of Appeals and the specific portion of the record relied upon to bring this case within the statutory provision believed to confer jurisdiction of this Court is set forth in the amended remittitur of the Court of Appeals of the State of New York, which reads, in pertinent part, as follows (R. 31):

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States: Whether the facts alleged in the complaint are sufficient to establish prima facie that plaintiff has been deprived of any of the rights guaranteed by the Fourteenth Amendment of the Federal Constitution. This court held that the rights of the plaintiff under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

III. Question Presented.

As stated, the Court of Appeals wrote no opinion in this case. However, a reading of the opinions of the Special

Term and of the Appellate Division indicates that the opposite conclusions reached by these respective courts on the constitutional question presented resulted from a difference of opinion as to the capacity in which respondent acted when constructing additions to its water supply system. The lower court, finding that the city was then acting as a proprietor, held that petitioner had a constitutional right to recover its damages (R. 22); whereas the Appellate Division, deciding that respondent was there engaged in the performance of a governmental function, held that petitioner was without remedy (R. 26, 27). Both Courts apparently were of opinion that the decision in *New Orleans Gas Co.* v. *Drainage Comm'n,* 197 U. S. 453, would control disposition of this action if the city acted governmentally when constructing additions to its municipal water system and neither of them discussed the difference in factual situation presented which sharply distinguishes one case from the other.

In the *New Orleans Gas Co.* case, *supra,* it was held that, where a utility elects to occupy the public streets pursuant to license or permission, the company must assume the cost of relocating its facilities whenever such relocation is required to permit the construction of street improvements. Here, however, petitioner's facilities were not located in the public streets under municipal license or consent. To the contrary, these water mains were so located solely for the purpose of obeying express commands delivered by respondent under a statute authorizing the issuance of summary orders. Thus the following question is presented:

> When a private water company installs property in and under public streets in obedience to summary municipal command requiring such action, may the municipality arbitrarily appropriate said locations without compensation for the construction of additions to its municipally owned water system?

IV. Reason Relied on for the Allowance of the Writ.

The Court of Appeals of the State of New York in this case decided a federal question of substance which has not been theretofore determined by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Court of Appeals of the State of New York to the end that the errors aforesaid may be corrected by this Court.

Dated: June 24, 1953.

JOHN J. DONOHUE,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

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No.

JAMAICA WATER SUPPLY COMPANY,

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THE CITY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York (Daly, J.) denying respondent's motion to dismiss petitioner's complaint in this action is reported at 113 N. Y. Supp. 2d 111, and printed in the record at page 20. The memorandum opinion of the Appellate Division of the State of New York, First Department, reversing the said order of the Special Term and granting judgment dismissing petitioner's complaint is reported at 280 App. Div. 834, and is printed in the record at page 26. The Court of Appeals of the State of New York wrote no opinion when affirming judgment entered on said order of the Appellate Division, First

Department, or when denying petitioner's motion for reargument and for amendment of the complaint and granting petitioner's motion for amendment of that Court's remittitur. Said decisions of the Court of Appeals are printed in the record at pages 27 and 31, respectively.

Jurisdiction

For this brief petitioner adopts the jurisdictional statement set forth at pages 4 to 6 of the annexed petition.

Statement and Summary of Argument

The allegations of the complaint are summarized at pages 2 and 3 of the annexed petition together with page references to the record. It there appears that petitioner, a water-works corporation, was required to install water mains and facilities at particular locations under the public streets of the City of New York by the provisions of certain orders of the Commissioner of Water Supply, Gas and Electricity of that City. The statute pursuant to which these orders were adopted is presently Section 736 of the New York City Charter (formerly Section 472 of the Greater New York City Charter), which reads as follows:

> "Private Companies.
>
> §736. The commissioner is hereby authorized to examine into the sources of water supply of any private companies supplying the city or any portion thereof or its inhabitants with water, to see that the same is wholesome and the supply is adequate and to establish such rules and regulations in respect thereof as are reasonable and necessary for the convenience of the public; and the commissioner may exercise superintendence, regulation and control in respect to the supply of water by such water companies."

It will be noted that this charter provision does not require or empower the Commissioner to hold hearings, to swear witnesses or to act judicially when exercising the authority there conferred. To the contrary, that officer is vested solely with the administrative duty of issuing summary commands at his own discretion.

The constitutionality of said Section 736 (formerly Section 472) authorizing the issuance of summary orders was directly challenged in *City of New York* v. *N. Y. Water Service Corporation,* 274 N. Y. 100. There the court upheld the statute because "in a situation so fraught with peril to a large part of its population, summary action is the thing demanded" (p. 106). The constitutional rights of private water companies were fully protected for, as the court said, "the City must make reasonable compensation for the services so commanded" (p. 106).

Petitioner obeyed said orders hereinabove referred to and installed water mains and facilities of a specified size and type at particular locations in accordance with explicit directions there set forth. Under the law, the Company was to be compensated for that obedience by being permitted to collect reasonable rates for water supplied to the City and its inhabitants by means of these installations, *i.e.,* rates sufficient to repay to petitioner the original cost of this property through charges for depreciation, plus other operating expenses and a fair return on its net investment, over a period measured by the estimated used and useful life of this property. However, prior to the expiration of such period and before petitioner had recovered its original investment through depreciation charges, respondent directed the removal and relocation of said utility property referred to in the complaint. This was done for the sole reason that respondent had made a unilateral administrative decision to occupy petitioner's said street locations with water mains connected to its

municipally owned water system serving the same general area as was being served by petitioner.

As a net result of this entire procedure petitioner forever will be deprived of a return on or of the unrecovered portion of the cost of said original installation of these said facilities unless it has a right to maintain this action. Said confiscatory result must follow for in New York, as in other states, the regulatory authority possessing rate-making power is required by law to fix utility rates on the present value of existing installations and, except where confiscatory temporary rates have been established under Section 114 of the Public Service Law, that value can be neither increased nor diminished by a consideration of conditions having no present or future functional vitality. Thus, as petitioner is prepared to prove upon a trial, the entire cost of property removed from service immediately must be charged against a utility's capital accounts and a company is not permitted to continue to collect either a return on property or to charge operating expense for the depreciation of property which has been destroyed irrespective of the circumstances causing that destruction. At this stage of the controversy, pending trial, petitioner's allegation of damages is one of fact which was admitted by respondent on its motion to dismiss petitioner's complaint under New York State law. Furthermore, respondent submitted the case to the Court of Appeals on the theory of "*damnum absque injuria*", thereby admitting that plaintiff has sustained damage as a result of respondent's actions in the premises, but contending that petitioner has no remedy under existing law. In its brief filed in the Court of Appeals, respondent summarizes its position as follows (p. 7):

"ARGUMENT

The plaintiff Waterworks Company is required both by the provisions of Administrative Code §83-5.0 as well as by established common law principles to relocate its facilities in the public streets at its own expense in order to accommodate the installation of the City's water mains. Under the circumstances, the relocation is deemed to have been made necessary by public convenience and the company's expense is *damnum absque injuria*."

Respondent contends that petitioner must accept the loss here complained of under authority of this Court's decision in *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453. There it was held that when a utility elects to locate property in the public streets it accepts the risk that a necessary public use might require that changes be made in that location and, in such event, the utility must relocate such property at its own expense. Petitioner, on the other hand, submits that the rule of the *New Orleans* case (*supra*) is not applicable to situations where the utility was forced to occupy the public streets by summary municipal command; that, should said decision be so interpreted, it would permit municipal officers to ruin all privately owned water-works corporations at will; and that respondent, by mutually conflicting and incompatible administrative directives, is, in reality, depriving petitioner of its property without compensation in violation of the due process clause of the Constitution of the United States.

Respondent further argues that when petitioner relocated its facilities in the public streets pursuant to written notice served upon it by the City's contractors and to the stipulation referred to in the complaint, it was merely complying with a duty imposed upon it by a city

ordinance, Section 83-5.0 of the Administrative Code of the City of New York. Petitioner answers by calling attention to the fact that, so far as can be ascertained, the Court of Appeals has never held that said city ordinance applies to private water companies; that where, as here, a law is open to two constructions, the one which obeys the constitutional mandate must be accepted; and, finally, that should this Court hold that petitioner's constitutional rights have been invaded, assuming the truth of the allegations of this complaint, then, undoubtedly, the Court of Appeals would directly hold that said city ordinance was never intended to apply to private water-works corporations under the circumstances here disclosed.

Question Presented

As set forth in the annexed petition this question is presented for determination:

> When a private water company installs property in and under public streets in obedience to summary municipal command requiring such action, may the municipality arbitrarily appropriate said locations without compensation for the construction of additions to its municipally owned water system?

ARGUMENT

The decision here sought to be reviewed approves of a confiscation of petitioner's property without due process of law and will enable municipalities to destroy all privately owned water companies at will.

Petitioner is well aware of the fact that this judgment, unless reversed, ultimately will result either in bankruptcy or in a forced sale of its property on terms dictated by City officials. Generally applied, this decision outlines a pattern to be followed by any municipality desiring to acquire the property of a water-works corporation for such price as it may be willing to pay irrespective of the equities of the situation then existing.

1. Municipalities have the duty of compensating water companies for obeying summary orders directing the installation of service extensions.

For many years this Court has held that it is a denial of due process and confiscatory *per se* for a governmental authority to order a utility to install main and service extensions unless such orders are supported by proper findings of fact made after a full hearing judicial in its nature.

New York & Queens Gas Co. v. *McCall,* 245 U. S. 345, 348, 349;
Washington ex rel. Oregon R. R. & N. Co. v. *Fairchild, et al.,* 224 U. S. 510;
N. Y. ex rel. Woodhaven G. L. Co. v. *Public Service Commission,* 269 U. S. 244.

Nevertheless, the Court of Appeals of the State of New York has decided that, because of the vital nature of their

business, the above mentioned rule does not apply to privately owned water-works corporations operating in that State. In *City of New York* v. *N. Y. Water Service Corp.*, 274 N. Y. 100, when sustaining the constitutionality of Section 472 of the Greater New York City Charter (now Section 736 of the present New York City Charter) the said Court held that such corporations lawfully may be required to extend their mains and facilities by summary order. The Court pointed out that in such cases the constitutional rights of these companies are fully protected because the municipality "must make reasonable compensation for services so commanded." The court said (pp. 105-106):

> "It is maintained by the defendant that the foregoing provision of section 472 of the charter of the city overruns constitutional limitations upon legislative power. This contention has been compressed into a single sentence: 'The specific constitutional defect in section 472 of the Greater New York City charter * * * is the lack of any provision for notice, a hearing and the compilation of a reviewable record, and, therefore, the delegation of police power to the Commissioner of Water Supply, Gas and Electricity to regulate the business of private water companies is unconstitutional.' At this point again, the argument disregards the quality of the charter provision. In a situation so fraught with peril to a large part of its population, summary action by the city is the thing demanded. A hearing before its administrative official in the first instance is not indispensable. This was in fact decided in *People ex rel. City of New York* v. *Queens County Water Co.* (*supra*), where also it was pointed out that the city must make reasonable compensation for services so commanded."

Petitioner agrees that a utility has no constitutional complaint if it be required to extend its mains and services into new territory lying within its franchise area by summary order so long as adequate compensation is guaranteed by a responsible governmental entity. And this is exactly the situation which exists when the Commissioner of Water Supply, Gas and Electricity of the City of New York acts under Section 736 of the present New York City Charter according to the decision of the court of last resort having power to interpret the same. As no other provision of law authorizes said Commissioner to order that main or service extensions be made by private water companies subject to his jurisdiction, respondent necessarily accepted the obligation of repaying petitioner for all of the expense it incurred as a result of obeying said orders referred to in Paragraphs "Eighth", "Twenty-second" and "Thirty-sixth" of the complaint herein. In other words, petitioner's duty to obey the Commissioner's said orders respecting the installation, size and location of these water mains and respondent's duty of compensating petitioner for that obedience are reciprocal and interdependent.

2. Petitioner has been damaged by being required to relocate the water mains and facilities referred to in its complaint.

Under New York State law, water-works companies, like other utilities, recover investments made in property to provide service by collecting rates established by the Public Service Commission acting under and pursuant to the provisions of the Public Service Law (Chapter 48, Consolidated Laws of the State of New York, as

amended). These rates, so prescribed, are designed to provide a company with a fair return on the present value of its existing property devoted to the public service.

In *Complaint against Adirondack P. & L. Corp.*, 27 N. Y. St. Dept. Repts. 585, at page 588, the Public Service Commission made this interpretation of its statutory duty:

> "Rates should be based upon the reasonable and fair value of the property as it exists at the time of hearing * * *."

This holding is in accord with that made in *Pennsylvania Gas Co.* v. *Public Service Comm.*, 211 App. Div. 253, 258, 259, where the Court said:

> "* * * The (utility) company is entitled to a reasonable return on the value of the property used in the public service at the time it is being so used. (*Bluefield Waterworks & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U. S. 679; *State of Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri*, Id. 276.)"

As recently as July 14, 1952, in Case 12455 involving the rates and charges of Consolidated Edison Company of New York, the Commission applied this settled principle as follows (*Re Consolidated Edison Co. of New York, Inc.*, 96 P. U. R. (N. S.) 194, 274).

> "It should be emphasized that the foregoing rate bases represent fair and reasonable estimates for the property *used and useful* in furnishing service to Consolidated Edison's electric customers during 1949 and 1950. * * *" (Italics supplied.)

The above mentioned rule (*i.e.*, that rates must be fixed on present value of existing installations) flows from application of the doctrine that a utility's past losses or profits cannot be used as a basis for rates to be charged con-

sumers in the future (*Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 31, 32; *Re New York Teleph. Co.* (1950), 84 P.U.R. (N.S.) 267, 295). From this it follows that when a water company installs a main and then is required to remove or replace the same, the investment made for original installation disappears and is gone forever for neither the Commission nor the courts have power to fix rates based upon non-existent property as a matter of law.

Admitting this, as it must be admitted, how do these companies collect for investments made pursuant to city edict when those same investments are later destroyed by subsequent city edict? The answer to this inquiry is, of course, that a city has the obligation of repaying waterworks corporations for all damages they sustain by reason of obeying mandatory municipal orders and this is the price that those municipalities must pay for being permitted to adopt such orders without judicial process. (cf. *Bronx Gas & Elec. Co.* v. *Maltbie*, 271 N. Y. 364.) It is important to remember that petitioner is not an occupant of the public streets by sufferance as are gas, electric, telephone and other utilities. Petitioner occupies the public streets with these particular pipes only because of respondent's peremptory command, it being protected solely by constitutional safeguards against confiscation. Strip these safeguards of real meaning as the City is here attempting to do, then petitioner and all other such companies are helpless to protect themselves against ruination.

Here, for example, respondent itself has first ordered petitioner to install certain water facilities and then, without allowing the Company time within which to recoup the investment so made during the normal course of business, it has commanded the destruction of that very same investment. In the normal course of events, petitioner would have recovered the cost of original installation of

these mains and facilities by depreciation charges over a period of forty, fifty or one hundred years, depending upon the size of the pipe involved and, during interim, the company would have been entitled to earn a fair return on the unrecovered portion of said cost. But, when relocated, every cent of the cost of original installation must be charged against and removed from its capital accounts immediately, and petitioner is thereupon forever deprived of all opportunity of recovering that investment or of collecting a return thereon during the period of its use. Under respondent's theory this said deprivation of property is finally to be accomplished without petitioner ever having had an opportunity for a judicial hearing with respect to the propriety or reasonableness of the City's actions or orders in the premises at any stage of the proceedings. As pointed out, such theory is condemned by express constitutional provision as interpreted by this Court.

Moreover, on this argument it is conceded that petitioner has sustained damages as a result of respondent's actions here complained of, for, by moving to dismiss the complaint herein respondent has admitted each and every factual allegation set forth therein, together with all reasonable inferences which may be drawn therefrom.

> *Lamb* v. *S. Cheney & Son,* 227 N. Y. 418, 420;
> *Nevins, Inc.* v. *Kasmach,* 279 N. Y. 323, 325.

And this Court, together with the Court of Appeals of the State of New York, have judicially recognized that a utility sustains a loss by being required to relocate property situate in the public streets and have rendered judgment accordingly whenever the rule of *damnum absque injuria* did not apply.

> *Los Angeles* v. *Los Angeles Gas Corp.,* 251 U. S. 32;
> *City of New York* v. *New York Telephone Co.,* 278 N. Y. 9;
> *Matter of City of New York* (*Gillen Place*), 304 N. Y. 215.

3. The rule of *damnum absque injuria* does not apply to the facts in this case.

In the Court of Appeals respondent argued that the loss petitioner sustained as a result of being required to relocate its said facilities in the public streets to accommodate the installation of City water mains was *damnum absque injuria.* In this connection respondent cited several cases holding that when a public utility elects to locate its properties under the public streets pursuant to municipal permission, a municipality has the reserved right to order the relocation of those installations without compensation whenever such changes are required by public necessity.

Petitioner does not challenge these decisions so cited by respondent in any way whatsoever. What petitioner does contend is that said rule cannot be extended to cover a situation where the occupancy of the public streets is required by summary municipal command rather than one resulting from the utility's free choice to exercise a duly granted authorization or permit.

This Court's opinion in *New Orleans Gas Co.* v. *Drainage Comm.,* 197 U. S. 453, announced the principle on which respondent relies. There the utility sued to recover the cost of relocating gas mains in the streets to permit the installation of a municipal drainage system. In denying recovery this Court pointed out that said gas company merely had a general right to use the streets, which it voluntarily chose to exercise at its own risk. The Court held (p. 461):

> "• • • It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health.

> The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made."

Continuing at page 462, the Court said:

> "* * * In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. * * *"

Similarly, in *Transit Com.* v. *Long Island R. R. Co.*, 253 N. Y. 345, 351, our Court of Appeals restated said principle as follows:

> "* * * Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge. * * *"

But the Jamaica Water Supply Company was not "content with the general right" to lay its pipes in the public streets and it did not install said pipes at any locations "chosen by it". On the contrary, these particular pipes were installed in the public streets and at specific locations thereunder only because of respondent's peremptory command which gave precise and unappealable directions finally settling all such questions. If respondent and other municipalities have the right to reverse such mandatory administrative orders at will whenever they desire to install a competing service, then continued existence for all privately owned water-works corporations rests upon the whim of the ever-changing political authorities governing the same.

4. Approval of the Court of Appeals decision in this case could result in the ruination of all privately owned water-works corporations.

The dangers confronting privately owned water-works companies should the decision of the New York State Courts in this case be confirmed, are both clear and present. Assume that, like other utilities, private water companies could be ordered to extend their lines only on it being determined after judicial hearing that the public convenience and necessity demanded such action. In such a proceeding one of the principal findings to be made on evidence would be that said service reasonably should be provided by the private company rather than by a competing municipal system. Once having lawfully established this fact on evidence, the municipality would be unable to later invade the utility's territory except upon proof of changed conditions. Obviously an unjustified construction of facilities not reasonably required for public use would not constitute a valid exercise of the police power permitting the uncompensated destruction of existing utility installations.

(*Los Angeles* v. *Los Angeles Gas Corp.*, 251 U. S. 32.)

However, under the decision in this case a city could order a private water-works corporation to extend its water mains to serve a proposed housing development and to install pipe of specified size at specific locations in the public streets. This new extension probably would operate at a loss during building operations, but after the development was fully occupied a city would possess power to enter this area with its own pipes; to order a private company to remove its mains to a less favorable location in the public streets; to forever deprive that utility of a

return of or on the cost of original installation; and finally a city could compete for business without being subjected to any of the burdens which the private company had been forced to assume solely by reason of previous city action. Such result would deprive private water companies of all real rights and privileges and impose upon them duties and obligations ruinous in their consequences. No other utility is subjected to similar hazards and to single out private water companies in this manner would surely deprive them of their constitutional right to the equal protection of law.

The one question presented to the State Courts was whether or not petitioner could submit any possible proof in this action that would permit recovery. In this connection it should be remembered that respondent has never attempted to justify its conduct in the premises either upon the ground of necessity or on the ground of reasonableness. On a trial it well might appear that the City easily and readily could have installed its mains at the new locations petitioner was forced to occupy without disturbing the existing water facilities. The fundamental issue here presented is—under the Constitution of the United States, may a municipality be vested with unlimited and arbitrary power to destroy a private water company whenever it may desire so to do by the issuance of conflicting summary directives commanding the installation, location, removal and relocation of property in the public streets?

5. Decision of the Constitutional Question here presented does not involve a consideration or construction of Section 83-5.0 of the Administrative Code of the City of New York.

The only issue before this Court is whether the facts alleged in the complaint are sufficient to establish *prima facie* that petitioner has been deprived of any of the rights guaranteed by the Fourteenth Amendment of the Constitution of the United States. So respondent's contention in the courts below that its actions in the premises are

authorized by city ordinance, Section 83-5.0 of the Administrative Code, becomes meaningless for no ordinance can command or permit unconstitutional actions or proceedings. Thus, should this Court decide the pending issue in petitioner's favor, then it follows that either said ordinance does not apply to water-works corporations under the facts pleaded in petitioner's complaint or that said ordinance is unconstitutional in its entirety.

Petitioner does not here challenge the constitutionality of said Section 83-5.0 of the Administrative Code of the City of New York for the simple reason that our Court of Appeals has never held that said city ordinance applies to private water companies. A reading of the decision of the Appellate Division written in this case shows that substantial controversy exists as to whether or not this ordinance should be construed to cover those companies. That court, after holding that petitioner came within the purview of this local law, proceeded to write as follows (R. 26):

> "* * * If it be assumed, as plaintiff contends, that this section of the Administrative Code does not apply to private water companies, plaintiff's rights in the public streets are, nevertheless, governed by the well-established rule of common law that a utility company must relocate its facilities in the public streets, at its own expense, whenever the public health, safety or convenience requires the change to be made. * * *"

Certainly the court would not have indulged in the foregoing assumption and then proceed to discuss this matter at length had petitioner's argument respecting that phase of the controversy in the lower courts been frivolous and devoid of substantial merit. And, as in other jurisdictions, the Court of Appeals of the State of New York has repeatedly and continuously held that, if a statute is

open to two constructions, one of which would obey and the other violate the Constitution, the courts must select the former and reject the latter.

> *Peo. ex rel. Simpson* v. *Wells,* 181 N. Y. 252, 257; *Peo. ex rel. Bridgeport Sav. Bank* v. *Feitner,* 191 N. Y. 88, 97.

So petitioner respectfully submits that should this Court hold that the facts alleged show a violation of petitioner's constitutional rights and privileges, then our Court of Appeals unhesitatingly would hold that, under the facts pleaded in the complaint, said Section 83-5.0 of the Administrative Code of the City of New York has no application in this case.

CONCLUSIONS

The annexed petition for writ of certiorari to the Court of Appeals of the State of New York should be granted.

Dated: June 24, 1953.

Respectfully submitted,

JOHN J. DONOHUE,
Attorney for Petitioner.

CHARLES G. BLAKESLEE,
ARTHUR MCCAULEY,
Of Counsel.

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FILED
JUL 28 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1953

No. 143

JAMAICA WATER SUPPLY COMPANY,
Petitioner,

against

THE CITY OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1953

No. 143

JAMAICA WATER SUPPLY COMPANY,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

The respondent in the above-entitled cause, for its statement in opposition to petitioner's application for a writ of certiorari respectfully shows the following:

I. Statement of Issue on Application for Writ of Certiorari to the Court of Appeals of the State of New York.

The following is the question which is involved herein:

Is the petitioner constitutionally entitled to recover expenses incurred by it in relocating its facilities in the public streets in order to accommodate the installation of City water mains and facilities?

The petitioner concedes (Brief, p. 21) that a public utility company which voluntarily locates its properties under the public streets has no constitutional right to compensation

when public necessity requires the relocation of its facilities. But the petitioner contends that because it was compelled by a municipal order to install those facilities it is entitled to recover the cost and expenses incurred by it in relocating pursuant to a subsequent municipal command.

The petitioner's contention completely ignores the fact that the only basis for the issuance of the original municipal order was petitioner's own failure to perform its statutory duties and, indeed, petitioner does not challenge the validity of that order. Petitioner's contention, if sustained, would reward defaulting utility companies while denying compensation to those which complied with the law.

As noted, petitioner's complaint does not challenge the validity of the order requiring the initial installation of its subject facilities (R. pp. 4-10). The complaint challenges only the validity of the subsequent order requiring relocation of those facilities (R. pp. 7-10).

Accordingly subdivision "1" of petitioner's argument (Brief, pp. 15-17), dealing with the question of the duties of municipalities to compensate water companies for obeying summary orders directing installation of service extensions, is wholly irrelevant. Equally irrelevant is petitioner's discussion (Brief, pp. 18-20) of the principle that utility companies are entitled to a rate which will produce a fair and adequate return. This obviously is not a rate case.

The New York Courts have held in this case that the relocation was required here at the petitioner's sole expense both by the provisions of §83-5.0 of the Administrative Code of the City of New York and by well established common law principles. *Jamaica Water Supply Co.*

v. *City of New York*, 280 App. Div. 834 (2nd Dept., 1952), aff'd 304 N. Y. 917 (1953).

The petitioner contends that by the action taken in this case it has been deprived of rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

II. No Substantial Federal Question Is Presented By the Petition.

Administrative Code §83-5.0 in plain language requires public service corporations whose pipes or mains are in the public streets to remove or otherwise protect and to replace such facilities whenever any city water main or pipe is to be constructed in the street in which the facilities of the Public Service Corporations are located. These provisions are not new. They have been in force in one form or another for almost seventy years (see N. Y. City Code of Ordinances, Ch. 23, Art. 9, §94 (Cosby's Code of Ordinances, 1915, p. 296); Brown's Revised Ordinances New York City, 1901, p. 60, §§312-313; Cosby's Code of Ordinances, 1910, p. 35, §§163, 164; Cosby's Code of Ordinances, 1914, p. 35, §§163-164).

So far as we are aware, this is the first time that any utility company has sought reimbursement of its expenses of relocation made pursuant to the mandate of these various code provisions.

Petitioner urges that the Administrative Code provision has no application in this case (Brief, pp. 25, 26). The fact is that the New York courts have held that the code provision does apply. That holding, we submit, is binding

on this Court. *Morely* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167 (1892).

Petitioner does not challenge the conclusion that if it had initially installed its facilities voluntarily it would have been obliged to relocate at its own expense. *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453, 461 (1905); *National Water Works Co.* v. *City of Kansas*, 28 Fed. 921, 923 (Cir. Ct., W. D. Mo., 1886); *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226 (1897); *N. Y. City Tunnel Authority* v. *Consolidated Edison Co.*, 295 N. Y. 467, 474-475 (1946); *Matter of City of New York (Gillen Place)*, 304 N. Y. 215, 224 (1952); *Brooklyn El. R. R. Co.* v. *City of Brooklyn*, 2 App. Div. 98 (2nd Dept., 1896); *Necaro Co., Inc.* v. *Eighth Avenue Railroad Co.*, 220 App. Div. 144, 146 (1st Dept., 1927).

Accordingly, the narrow question presented on this application is whether the petitioner is entitled to reimbursement merely because it initially placed its facilities in the streets pursuant to a municipal order issued by reason of the petitioner's failure to install facilities to render the service required of it by an express statute and by the provisions of its franchise.

In *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 658, 659 (1910), this Court held that a private water company was required at all times to maintain adequate storage and distribution facilities in order at all times to supply the needs of the public.

The petitioner here was required to install the subject facilities to meet the public need for water in its franchise area not only by virtue of its franchise but also by the

express command of a statute (McKinney's New York Consolidated Laws, Book 62, Transportation Corporations, §42 [formerly §81]).

New York City Charter, §736 (formerly Greater New York City Charter, §472) expressly authorizes the City's Commissioner of Water Supply, Gas & Electricity to issue orders requiring private water companies to furnish water required by residents of the territory included within the franchise areas and to extend facilities in such areas whenever required. As stated in petitioner's brief (p. 10), that section was the authority for the issuance of the orders to the petitioner to install the facilities which are the subject matter of this application. The City's Commissioner of Water Supply, Gas & Electricity is authorized to invoke the provisions of the Charter §736 only when a water company defaults in performing the obligation imposed upon it by the provisions of Transportation Corporations Law, §42 of the State of New York. In *City of New York* v. *Jamaica Water Supply Co.*, 181 App. Div. 49 (2nd Dept., 1917), aff'd 226 N. Y. 572 (1919), it was held that the provisions of New York City Charter, §736 empowered the City's Commissioner of Water Supply, Gas & Electricity to make an order requiring this petitioner to extend its facilities because it had failed to make such extensions as required by Transportation Corporation Law, §42. Undoubtedly, as the result of that decision, the petitioner has never made any attempt to challenge the validity of the order directing the initial installation of the facilities involved on this application.

It is thus clear that the petitioner asserts greater rights by reason of its failure to perform its duty to install needed facilities than it would have had, if it had voluntarily

installed those facilities in the performance of the obligation and duty imposed upon it by the positive command of a statute.

It is to be noted that water companies are not the only public service corporations which can be compelled to install service facilities in the streets. Public Service Law, §66(2) of the State of New York (McKinney's Consolidated Laws of New York, Book 47) vests in the Public Service Commission of New York authority to require gas and electric companies to extend their services. No gas or electric company in New York has ever been awarded relocation expenses merely because the relocated facilities were initially installed in obedience to an order of the Public Service Commission. Moreover, in *National Water Works Co.* v. *Kansas,* 28 Fed. 921 (Cir. Ct., W. D. Mo., 1886), recovery for relocation expenses was denied where, as here, the initial installation of the plaintiff water company's facilities was in obedience to a municipal command.

The above authorities conclusively establish petitioner's obligation to relocate its facilities in order to accommodate the installation of a usual street improvement such as the City's water main. But even if this obligation existed only with respect to municipal installations made in connection with the exercise by the City of a governmental function, the petitioner would be in no better position. For this Court has held that in the construction or extension of its water supply system the City of New York exercises a governmental function. *Brush* v. *Commissioner,* 300 U. S. 352, 370-372 (1937). Moreover, the New York courts have held in this case that the installation of its subject water mains constituted the exercise of a governmental function.

That holding is binding on this Court. *Morely* v. *Lake Shore Railway Co.*, 146 U. S. 162 (1892).

We submit that the questions presented by this appeal have so repeatedly and uniformly been decided adversely to petitioner's contentions that no substantial question is presented by this application entitling the petitioner to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE respondent respectfully moves that the within application for a writ of certiorari to the Court of Appeals of the State of New York be denied.

New York, July 22, 1953.

DENIS M. HURLEY,
Corporation Counsel,
Counsel for Respondent,

By SEYMOUR B. QUEL,
Assistant Corporation Counsel.

WILLIAM A. MARKS,
of Counsel.

APPENDIX A

Administrative Code of The City of New York §83-5.0 (Williams Ed., p. 313), provides in part as follows:

> "§83-5.0. EXCAVATION FOR PUBLIC WORKS.—a. Notice to public service corporations. Whenever any sewer, culvert, water main or pipe is to be constructed, * * * in any street in which the pipes, mains or conduits of public service corporations are laid, * * *, the contractor therefor shall give notice thereof in writing to such corporation, * * *. b. Public service corporations shall protect their property. Public service corporations whose pipes, mains or conduits are about to be disturbed by the constructing, * * * of any sewer, culvert, water main or pipe, * * *, shall, on the receipt of the notice provided for in the preceding subdivision, remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, * * *."

New York City Charter §736 (formerly a part of superceded Greater New York Charter §472) reads as follows:

> "PRIVATE COMPANIES.
>
> §736. The commissioner is hereby authorized to examine into the sources of water supply of any private companies supplying the city or any portion thereof or its inhabitants with water, to see that the same is wholesome and the supply is adequate and to establish such rules and regulations in respect thereof as are reasonable and necessary for the convenience of the public; and the commissioner may exercise superintendence, regulation and control in respect to the supply of water by such water companies."

Appendix A

McKinney's Consolidated Laws of New York (Book 47, Public Service, §66) reads in part as follows:

"The commission shall:

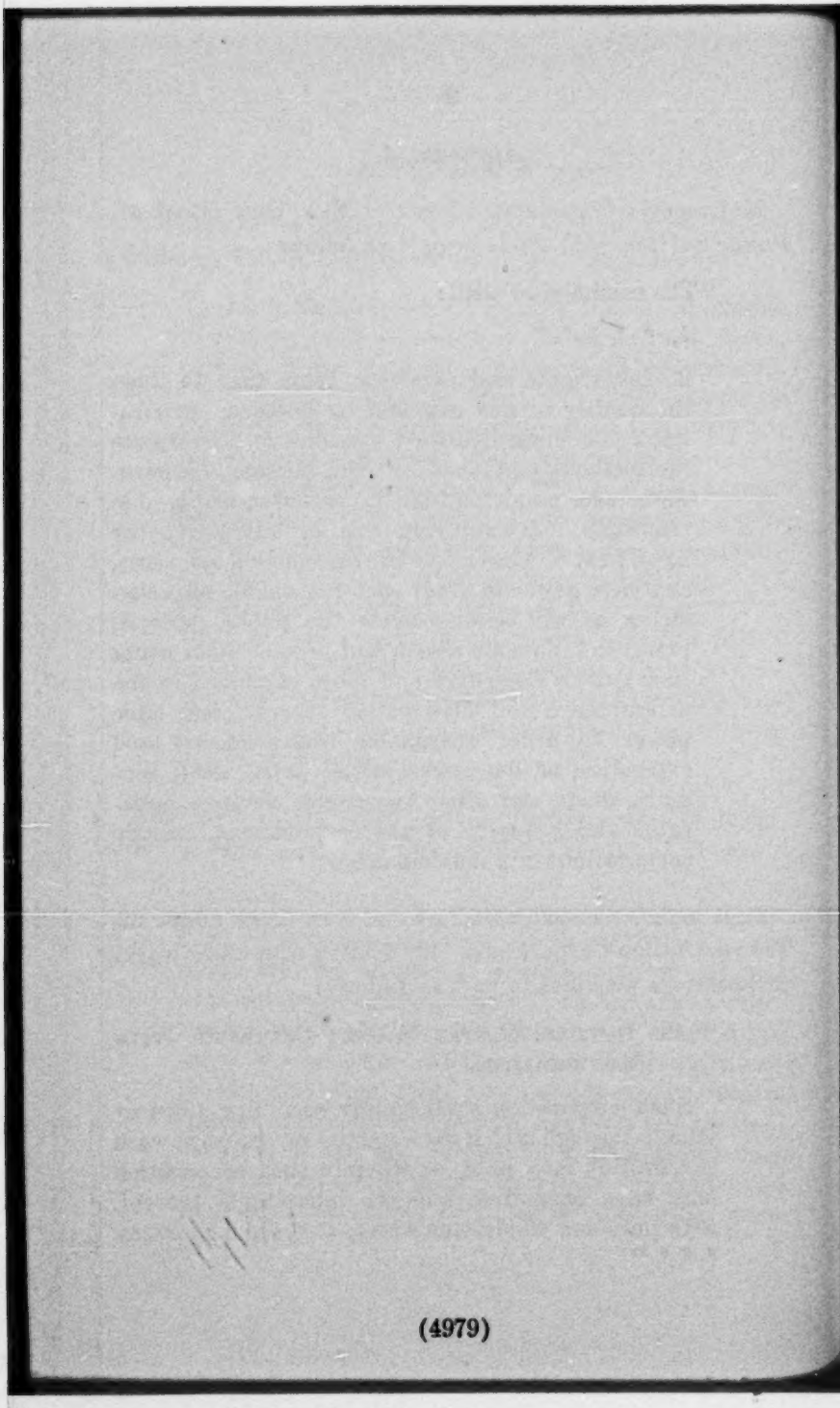
1. * * * * *

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electric corporations and municipalities; * * * "

McKinney's Consolidated Laws of New York (Book 62, Transportation Corporations §42) dealing with water works corporations provides in part as follows:

"§42. Duty to Supply Water; Contracts With Municipalities

Such corporation shall supply each city, town or village through which the conduits or mains of such corporation may pass, or wherein such corporation may have organized, and the inhabitants thereof, with pure and wholesome water, at reasonable rates. * * * "



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 143

JAMAICA WATER SUPPLY COMPANY,
Petitioner,

against

THE CITY OF NEW YORK,
Respondent.

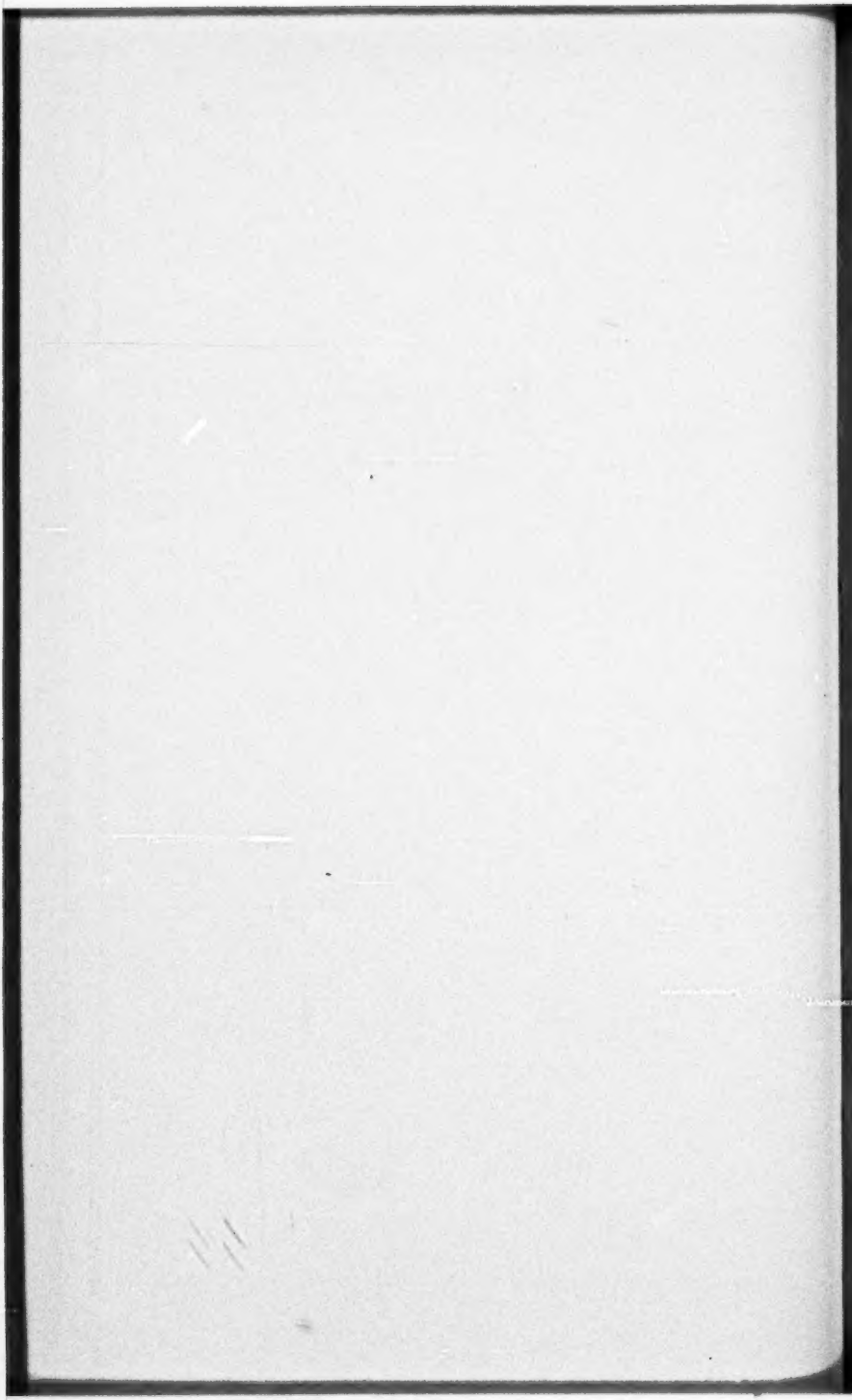
PETITIONER'S REPLY BRIEF

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Dated: New York, August 4, 1953.

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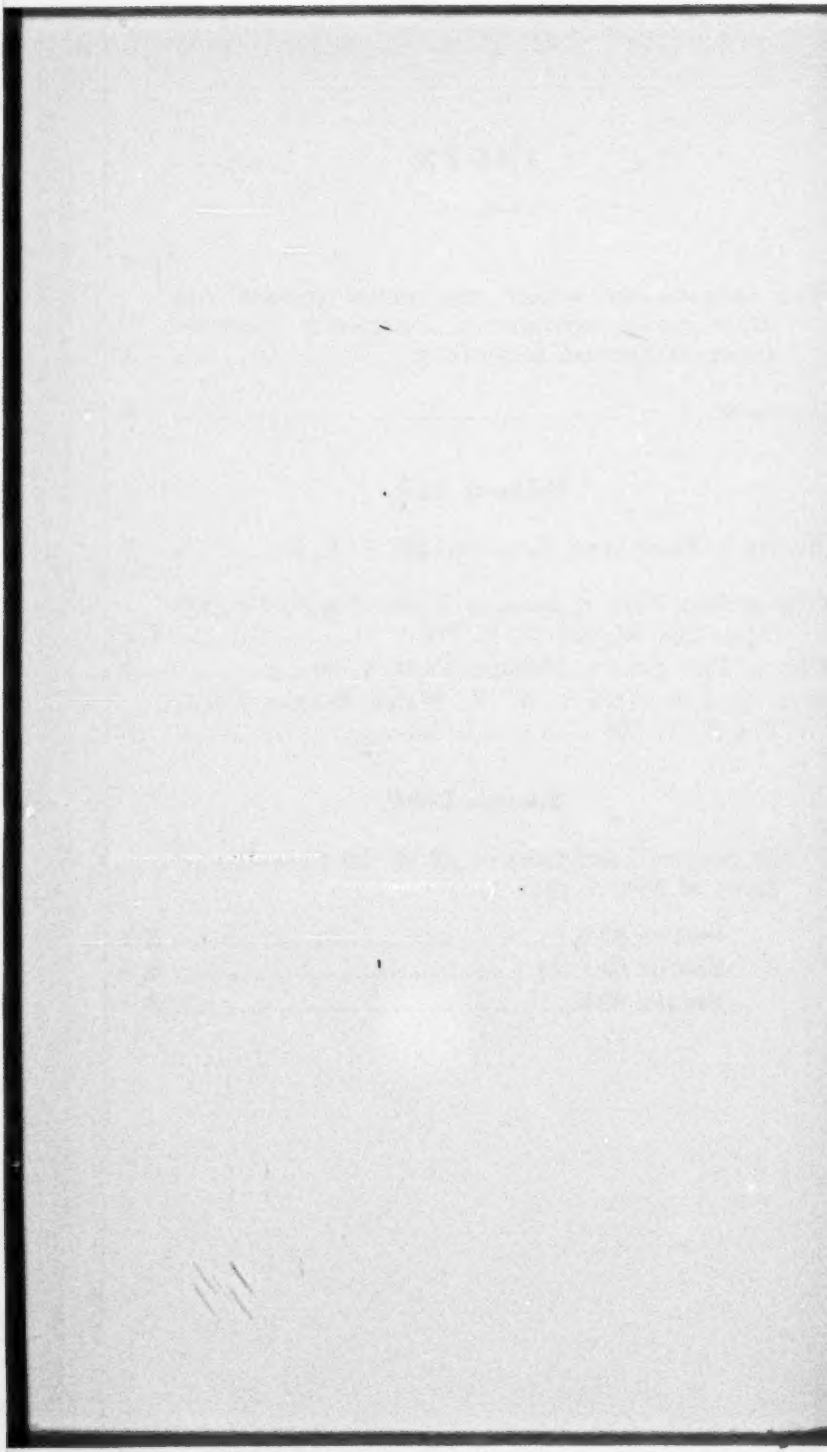
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

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JAMAICA WATER SUPPLY COMPANY,

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against

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Respondent.

PETITIONER'S REPLY BRIEF

The filing of this reply brief is occasioned by the fact that respondent rests its opposition to petitioner's application for a writ of certiorari on grounds not heretofore discussed or argued in the courts below.

The grounds on which respondent opposes the granting of petitioner's application have no legal or factual foundation.

Citing an opinion written by the Appellate Division in the year 1917 in *City of New York* v. *Jamaica Water*

Supply Company, 181 App. Div. 49, as authority, respondent argues that (Resp. Br. p. 5):

> "* * * The City's Commissioner of Water Supply, Gas & Electricity is authorized to invoke the provisions of the Charter §736 only when a water company defaults in performing the obligation imposed upon it by the provisions of Transportation Corporations Law, §42 of the State of New York. * * *"

However, despite respondent's contrary assertion, only the right of the City to enforce orders directing private water companies to install mains and service extensions by mandamus was at issue in that case, and it was the result reached by the Appellate Division, not the reasoning of the lower court, which was affirmed by the Court of Appeals in 226 N. Y. 572. This fact became abundantly clear when, in 1937, the Court of Appeals had occasion to directly rule upon the meaning, force and effect of city orders adopted pursuant to Section 472 of the Greater New York City Charter (now New York City Charter, §736). In *City of New York* v. *N. Y. Water Service Corp.,* 274 N. Y. 100, the highest court of the State of New York sustained said law against constitutional attack expressly on the ground that, when action is taken thereunder, "the city must make reasonable compensation for services so commanded." And, according to the decisions of this Court cited at page 15 of petitioner's brief, the imposition of such condition was essentially to sustain the constitutionality of the summary powers purportedly granted by that said charter provision. The question now presented is whether a company receives the required "reasonable compensation" when forced investments made pursuant

to summary city order are later destroyed by a conflicting, arbitrary, municipal command.

Under our system of jurisprudence no court or administrative officer has power to declare that a person is guilty of a violation of law or of a statutory duty without hearing and the presentation of sufficient supporting evidence. The Public Service Commission of the State of New York, a body vested with much wider authority than that possessed by the New York City's Commissioner of Water Supply, Gas & Electricity (*City of New York* v. *Maltbie,* 274 N. Y. 90), must hold hearings (Public Service Law, Chapt. 48 of the Consolidated Laws of N. Y., §89-c (4)), before reaching a conclusion that any water-works corporation has failed to comply with its lawful duties and obligations. The importance of said hearing is apparent, for a finding that a water-works corporation has failed to provide safe and adequate service, instrumentalities and facilities, is a violation of Section 89-b of the Public Service Law and subjects the utility to the imposition of drastic fines and penalties under the provisions of Section 89-k of that Law.

For the foregoing reasons petitioner respectfully submits that the Commissioner of Water Supply, Gas & Electricity of the City of New York has never made a valid determination that petitioner has defaulted in the performance of any obligation imposed upon it by law; that, in the absence of such valid determination, it must be assumed that this petitioner has complied fully with all of its legal duties and obligations (*Berkey* v. *Third Ave. Rwy. Co.*, 244 N. Y. 84); and that the grounds upon which respondent opposes the granting of petitioner's

pending application for a writ of certiorari to the Court of Appeals of the State of New York are without substance as a matter of law.

Dated: August 4, 1953.

Respectfully submitted,

JOHN J. DONOHUE,
Attorney for Petitioner,

CHARLES G. BLAKESLEE,
ARTHUR MCCAULEY,
Of Counsel.

APPENDIX A

Section 89-b of the Public Service Law of the State of New York (McKinney's Consolidated Laws of New York, Book 47) reads in part as follows:

> "**§89-b. Safe and adequate service; just and reasonable charges; unjust discrimination; unreasonable preference**
>
> 1. Every water-works corporation shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. * * *"

Section 89-c(4) of the Public Service Law of the State of New York (McKinney's Consolidated Laws of New York, Book 47) reads in part as follows:

> "* * * whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such corporation are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters; * * *"

Section 89-k of the Public Service Law of the State of New York (McKinney's Consolidated Laws of New York, Book 47) reads as follows:

> "**§89-k. Forfeiture for noncompliance with order**
>
> Every water-works corporation and the officers, agents and employees thereof shall obey, observe

and comply with every order made by the commission under authority of this chapter so long as the same be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this chapter, shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this chapter shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense. Added L. 1931, c. 715, §3. Eff. July 1, 1931."